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Trusts—Torts

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The volume of case law upon the problem of torts arising out of the administration and operation of property held in trust is not large. One does not find it possible to answer upon authority many of the questions which suggest themselves in an attempt to outline the various situations which might arise. Literature of the subject as found in the periodicals and treatises, as might be expected, is also meager. However, what has been written has been so well done and by such able scholars that it is perhaps a work of supererogation to write upon it again. The articles by Professor Scott[1] and by Mr. Justice Stone,[2] although published some years ago, do not leave much

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[1] Scott, "Liabilities in the Administration of Trusts," 28 Harv. L. Rev. 725 (1915).

[2] Stone, "A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee," 22 Col. L. Rev. 527 (1922). Mr. Justice Stone's theory briefly stated is that the trustee has the power to appropriate trust property to the payment of trust expenses regardless of the state of his accounts and that in every case where the third party's judgment whether in Tort or Contract proves uncollectible against the trustee personally the claimant should be able to recover from the trust estate in equity regardless of whether trustee is in arrears. This should be so because it results in imposing on the trust estate those economic burdens which are incidental to its proper administration. He does not contend, however, that the action should be brought against the trustee in a representative capacity, but adheres to the view that this right of

to be said beyond bringing the subject up to date by the presentation of a few cases subsequently reported and presenting the writer's own view. It may also be possible to suggest a recognizable trend in the recent cases. Mr. Bogert's unsurpassed treatise published in 1935[3] of course discusses the general state of the law on this topic and cites exhaustively the cases.[4]

The rules on this subject as they have long been accepted by the majority of states are concisely stated in the leading texts. As Mr. Bogert puts it[5]: "The problem arises whether the party suffering damage from the tort should sue the trustee as trustee or should bring an action against him simply as a private individual, without reference to his representative capacity. Shall he seek satisfaction of his judgment out of the trust property or out of the property of the trustee? In harmony with the rules . . . with respect to contract liability the

the claimant is a derivative one, equitable in its nature and that for reasons of practicable convenience the creditor may be required to exhaust his legal remedies before resorting to equity. Mr. Justice Stone does not indicate that he favors imposing upon the trust estate the consequences of a tort committed by the trustee as his own negligence, and, if the trustee is insolvent, would as to that class of torts let the loss rest where it fell rather than shift it to he *cestui que trust*. This of course is the logical sequel of the theory that the third party's right is personal against the trustee but only derivative against the estate.

[3] 3 Bogert, *Trusts and Trustees* (1935), Chapter 34.

[4] Other sources for general discussions of the entire problem and collection of authorities include: 1 Perry, Trusts and Trustees, sec. 437a; 7 A.L.R. 408; 14 A.L.R. 371; 44 A.L.R. 637; Loring, Trustee's, pp. 33, 188; various notes in periodicals of which see especially, 43 Harv. L. Rev. 1122, 18 Cornell L.Q. No. 134; Other noteworthy articles dealing with this problem include: Burdett, "Liability of the Trust Estate for Torts of the Trustee," 39 W. Va. L.Q. 251 (1933); Kerr, "Liability of Trust Estates for Torts of the Trustee's Servants," 5 Tex. L. Rev. 368 (1927); and, Brandeis, "Liability of Trust Estates on Contracts made for their Benefit," 15 A. L. Rev. 449 (1881).

For particular reference to Ohio Law on this point the reader is referred to Vanneman, "Liability of the Trust Estate for Obligations Created by the Trustee in Ohio," 9 U. of Cin. L. Rev. 1 (1935); and, 40 Ohio Jur. 475, the title "Trusts" by Mr. Vanneman. The present writer has discovered no Ohio cases subsequent to those referred to by Mr. Vanneman in the sources mentioned and has nothing to add to those sources which have any particular reference to Ohio Law.

[5] 3 Bogert, "Trusts and Trustees," p. 2158; secs. 264, 265, 266. Restatement, Trusts.

great weight of English and American authority imposes responsibility for such torts upon the trustee in his individual capacity and not as a fiduciary. Any judgment recovered is collectible out of the private property of the trustee and not out of the trust assets." Similarly Perry on *Trusts and Trustees*,[6] "By the weight of authority a trust estate cannot be held liable for torts committed by the trustee. Ordinarily he can be held liable only in his individual capacity, and he is personally liable to third persons for his torts either of misfeasance or of nonfeasance in failing to keep the trust property in repair, irrespective of his right of reimbursement."

At this point it is proposed for the sake of brevity hereinafter to introduce a word of convenience. This word or word combination is "TRUST-TORTS" and will be defined for the purposes of this paper as follows: Wrongs committed in the course of maintaining, operating, or administering property held in a trust or fiduciary capacity by one person or persons, etc., according to the usual legal rigamarol for the use or benefit of another or others and shall include both wrongs committed by the act of the trustee himself or by agents and employees working under his control or general direction in any capacity in connection with the trust.

Reasons consonant with a jurisprudence of dry and formal legal and equity concepts and quite self righteously and disdainfully disregardful of the functional situation under which most "TRUST-TORTS" happen, have been elaborated in the cases from which the general statements as made in Bogert and Perry are drawn. A reason appearing more prominently in the earlier of such cases when these rules were taking form was that trust funds must not be dissipated because of the wrongful acts of trustees.[7] Here as at so many points in the law, rights of

[6] 1 Perry, Trusts and Trustees, sec. 437a.

[7] *Parmenter* v. *Barstow*, 22 R.I. 245, 47 Atl. 365 (1900); *Wahl* v. *Schmidt*, 307 Ill. 331, 138 N.E. 604 (1923). The note in 44 A.L.R. says at page 638, "The theory is that when a trustee, executor commits a tort he steps out of the line of his duty, in other words, in so far as he commits a wrong, he does not represent the estate and therefore it should not be held

property get more than an even break in the age-long conflict with the rights of personality. Gradually and rather quietly this argument was dropped in the "Trust-Torts" cases as it was in the cases involving the tort liability of charities and in the more recent cases one sees but few references to it.[8]

Other cases given as a reason for the prevailing rule that the courts cannot recognize as "Trustee As Such" as a distinct personality from the trustees as a person.[9] Of course he is often not a person but a corporation something like a bank and indistinguishable from a bank to anyone but a lawyer. This is to say, the courts have been unwilling to ascribe legal personality to a trust. In other words a trust is not a legal thing. It is but a relation recognized in equity between other legal persons. In spite of the easy wave of the hand with which courts have brushed aside any difficulty in the way of calling a corporation a person; in spite of the fact that they have for various purposes treated other creations of the kind as funtioning entities, they have in the main been unwilling to do this with trusts. There is a plausible consistency about this attitude particularly as between trusts and corporations in that in both situations primary regard is paid to form rather than to function.[10] A

liable." Note how commentators fall into the way of speaking of the trust as though it were an entity. *Deschler* v. *Franklin*, 11 Ohio C.D. 188 (1900).

[8] Feezer, "The Tort Liability of Charities," 77 U. Pa. L. Rev. 191 (1928). Prof. Vanneman also criticizes this reason as given for the immunity of charities from tort liability. 9 U. Cin. L. Rev. 1, 3.

[9] Cases might be multiplied in these footnotes but why use up time, type or space. The cases will be found collected in the leading treatises, annotations and in the articles by more industrious writers whose work I have referred to. As to this point see particularly the best of the law review cases noted, 18 Cor. L. Q. 134 (1932) and cases there cited.

[10] To digress somewhat, a most interesting discussion of the way in which the Supreme Court at Washington has been able to do what it wanted to do by calling a corporation a person within the meaning of the 14th Amendment is found in Prof. Thurman Arnold's new book *The Folklore of Capitalism*. See Chapter VIII, "The Personification of Corporations" in which it is explained how great organizations can be treated as individuals and the curious ceremonies which attend this way of thinking. The above reference may not be the most pertinent imaginable legal authority for the statement in the text to which it is footnoted but the writer believes that every lawyer should read Arnold's book and this seems the best place to say so.

corporation may run a business or operate properties whose activities produce torts. So may a trustee, but in either case we must find a person upon whom the hand of law may be laid with the judgment, "Thou shalt pay."[11] Of course the legislature did the same thing to trusts so far as concerns the rights and necessary procedure of third parties having claims against it. This has in effect been done in a few states in which there is a statute declaring that a trustee is a general agent for the trust property and providing that, "His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal."[12]

As we have already seen in the great majority of jurisdictions the tort claimant must bring his action against the trustee as the person involved. The trustee must be named defendant as a simple person because the law cannot recognize his functional personality as an agent of what is from a practical point of view an organization, an institution. Why? Because never having been baptized with the water of life wherewith the legislature blesses corporations, it is not a person. I have continued to speak of the trust as though it were something in spite of the cases which say it is nothing and shall continue so to speak of it. This is not to deny that it is a phantom but only in the same sense that a corporation is a phantom. So is a partnership a phantom but it is often recognized by the law. So is an unincorporated labor union with a half-million members a phantom but it may be sued as an entity in the Supreme Court

[11] Even when so complex a business enterprise as a street railway was operated by a trustee, a personal injury resulting from the negligence of a motorman has been held to impose only personal liability on the trustee, *O'Toole* v. *Faulkner*, 29 Wash. 544, 70 Pac. 58 (1902). Moreover in this case the trustee was purely a straw man, a bookkeeper in the street railway offices who was not even given an extra dollar or two in his weekly pay envelope for undertaking the responsibilities of owner of the legal title of the entire plant. This is the sort of case where the law's passion for riding a concept to what ever end it may lead makes the profession look ridiculous to the layman.

[12] Cal. Civ. Code Sec. 2267 (1931), Mont. Rev. Code Supp. Sec. 7914 (1927), N. D. Comp. Laws, sec. 6305 (1913), S. D. Comp. Laws, sec. 1220 (1929).

of the United States if the other circumstances essential to jurisdiction by that court are present.[13]

It seems desirable to the writer to speak of the trust as though it were an entity when we see it functioning as such. The courts have shown us in various and diverse situations that they are able to invoke the fiction of personality. It is a useful rabbit in the hat and it has been made to work very useful legal miracles by serving to explain in terms of familiar legal formulas which find acceptance by the profession, results which lawyers and layity alike intuitively regard as acceptable adjustments of various concepts. The writer is here regreting that there has not been the willingness to use it in other cases where it would work equally well and thus avoid the resort to the more round about legal hocus-pocus which is resorted to in order that the victim of a "TRUST-TORT" may get his money and at that out of the trust *res*. If he does get it, of course it usually comes in the end from the trust estate. The unfortunate feature of the present prevailing method is that all parties concerned, claimant, trustee and *cestuis* are put to delay and increased expense. Then too there are cases where the claimant is barred from relief although the trust estate may be able to pay without hardship.[14]

[13] *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 66 L. Ed. 975, 42 Sup. Ct. Rep. 570 (1921). As to the suability of unincorporated associations generally and for a revealing picture of the judicial process at work with the concept of legal personality in which the said "J.P." first raises the fiction and then crys, "Off with his head," with all the consistency of the red queen, see Sturges, "Unincorporated Associations as Parties to Actions," 33 Yale L. J. 383 (1923), Note 24 Va. L. Rev. 204 (1937).

[14] It was the writer's intention to include in this text a somewhat extended discussion of various instances and situations where courts have considered and sometimes used the device of fictitious personality. It seems on further consideration somewhat of an insult to the learned reader's intelligence to do this at the length originally contemplated, and the material collected has accordingly been sifted and compressed into this footnote.

The most familiar and the most obvious example is THE CORPORATION whose right to be recognized as an entity, of course arises out of legislation, but the concept behind it is, of course, one created by lawyers, and many of the uses of the fiction personality in dealing with corporation problems in the law involves what some people like to damn with the phrase "judicial

The ultimate subjection of the trust property to these tort claims is accomplished in this way. If the trustee pay the judgment out of that pocket in which he keeps his own money, he may then reach into the other pocket where he keeps the trust

legislation." If that phrase means anything in particular, it, of course, means nothing more than the job courts are always doing, and that is the task they exist for, *viz.*, to decide cases. When a court decides a case, it is the law for the parties to the particular controversy, and that is true to the extent and in the same manner whether it follows a very close local precedent or decides a point without local precedent on the basis of its judgment. This is so whether it chooses one or the other of various rationalizations to be found in older cases or works out a new one of its own. It is true, whether there is a statute in the picture or not, because the court has still to determine whether the statute applies or not and, if it does, what it means in its relation to the instant controversy. Powell's Cases on Possessory Estates, p. 2, contains a quotation from President Theodore Roosevelt's Message to Congress, Dec. 8, 1908, which voices this same thought: "The chief lawmakers of our country may be, and often are, the judges because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental they give direction to all law making."

As this is not a digest of cases, but a plea for realistic thinking about trusts, it is futile to list cases dealing with all the ways in which corporations are treated by the courts as persons.

PARTNERSHIP: Of course a partnership is not an entity, a person; it is a mere aggregation of individuals. Or is it? That was fought out when the Uniform Partnership Act was drafted and the commissioners rejected Dean Ames' draft, which followed rather consistently the entity theory, and adopted William Draper Lewis' draft, which was supposed to employ the aggregate theory but which will not work in many situations without thinking about and treating the "firm" as an entity apart from the individuals who own it. "You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the *firm* as a separate *entity* from the existence of the partners; a notion which was well grasped by the old Roman lawyers and which was partly understood in the courts of equity before it was part of the whole law of the land as it is now." Jessell, M. R., in *Pooley* v. *Driver*, 5 Ch.D. 458, 476 (1876).

As to whether a partnership is an entity since it is a business device, created and used by business men, it might be well to consider how they look at it, and especially how they use it. Is there any doubt that functionally it is something apart from its members? Gilmore on Partnership, pp. 114 to 117. There are many cases in which courts have said (for the purpose of explaining a particular decision, of course) that a partnership is an entity. There are plenty of others, where in one form of circumstances or another, courts have said a partnership is not an entity, but "even though a court may not recognize the partnership as an entity, it will recognize the usage of business men

money and take for himself the same amount. This is called the trustee's right of reimbursement. This is quite generally conceded by the authorities subject to qualifications which will be mentioned later. One of the leading cases standing for this

in interpreting their contracts." Gilmore, p. 114. Likewise there has been much writing in the periodicals for and against the idea of a partnership as an entity. 28 Harv. L. Rev. 762 (1915); 29 Harv. L. Rev. 158, 291 (1916); 29 Harv. L. Rev. 838 (1916); 24 Yale L.J. 617 (1915); 15 Mich. L. Rev. 609 (1917); 36 Yale L.J. 254 (1926); 29 Col. L. Rev. 1134 (1929). Even trust law talks about partnerships as if considering them entities when it says, for example, that if a partner takes title in his own name he holds it in trust for the "firm." The Bankruptcy Act of 1898 sec. 1 (19) treats a partnership as an entity.

ESTATES OF DECEASED PERSONS: For the purpose of administering assets and disposing of claims, etc., from a practical standpoint, the "estate" functions as something apart. *Hendee* v. *State*, 80 Neb. 80, 113 N.W. 1050 (1907): "The estate of a deceased person pending litigation is a legal entity and in charging a violation of section 121 of the Criminal Code (embezzlement) it is sufficient to allege as to ownership that the money or property embezzled belongs to such an estate"; *Billings* v. *State*, 107 Ind. 54, 6 N.E. 914 (1886): "To our minds it seems reasonable that the estate of a decedent should be regarded as an artificial person."

This analogy of the decedent's estate is coming very close to the trust situation, to which it is desired by the writer to assimilate these other situations so close that what is said throughout the text of this paper refers to executors having duties to perform in connection with the property in their hands to the same extent that it does to permanent trusts, either under the will creating both offices, executor and trustee, or under a deed or indenture creating a trust *inter vivos*.

UNBORN CHILDREN: Unborn children may or may not be persons under the law for one purpose or another. A case which attracted considerable attention a few years ago was *Drahner* v. *Peters*, 232 N.Y. 220, 133 N.E. 567, 20 A.L.R. 1503 (1921) in which plaintiff's mother fell into a coal hole negligently left open in the sidewalk by defendant and was so hurt that plaintiff was prematurely born and suffered other injuries by which plaintiff was handicapped for life. It was held that plaintiff had no cause of action because he was not in existence as a person at the time of injury. The reason given by the court was that the child is part of the mother and has no separate existence. The court said: "The injuries when inflicted were injuries to the mother." Cardozo dissented. This decision, which reversed the lower court, thus conformed to the other cases up to that time in the opinion that an unborn child is not a person when it comes to being the victim of a tort. However, the unborn child has since been recognized in the law of torts in Texas. In *Magnolia Coca Cola Co.* v. *Jordan*, 124 Tex. 347, 47 S.W. (2d) 901 (1932), parents were allowed to recover for death (under the statute which allowed recovery for wrongful death only where the deceased could

rule is *Benett* v. *Wyndham*[15] in which the trustee of an estate directed the bailiff to have certain trees cut for lumber to be used in making repairs. The baliff ordered the woodcutters usually employed on the estate to cut certain trees. In doing so they allowed a tree to fall so that a branch struck a passerby in a public lane breaking his leg. He sued the trustee personally and recovered very substantial damages which the trustee paid. It was held that as between the trustee and the estate this expense should be borne by the estate as the trustee is entitled to indemnity.

If the trustee has no money in his personal money pocket, or, even if he has, he may take the money directly out of the trust pocket and pay the creditor. This is called the trustee's

have recovered had he lived) of a child born prematurely because of a negligent injury to the mother, thereby causing the child's death. This court reasons from the situation where a posthumous child is allowed recovery for the wrongful death of its father. Of this question, says 5 Minnesota Law Review, at p. 240: "It is interesting to note what this non-existent person (unborn child) can do. Justice Buller in *Thelluson* v. *Woodford*, 4 Ves. 227, 322 (1799), (this is the famous case on the rule against accumulations and is, in a sense, another trusts case) points out that this non-existent person may be vouched in a recovery, may be an executor, may take under the Statute of Distribution, may take a devise, may have a guardian and may have an injunction and Justice Buller approves the statement of Lord Hardwick in *Wallis* v. *Hodson*, 2 Atk. 115 (1740) that a child *en ventra sa mere* was 'a person in *rerum natura* so that by rules of the common and civil law she was to all intents and purposes as much as if born in the father's lifetime.' The law has carefully provided for the protection of property rights of an unborn child * * * ." Likewise in criminal law for purposes of homicide an unborn child may be a person; see *Clarke* v. *State*, 117 Ala. 1, 23 So. 671 (1898) and Clark & Marshall, Crimes (3rd Ed. 1927) sec. 234(b). In this matter see case notes, 22 Col. L. Rev. 379; 7 Cornell L.Q. 275; 70 U. of Pa. L. Rev. 335; 31 Yale L.J. 563; 26 Yale L.J. 315; 46 Harv. L. Rev. 344. The interesting analogy to be drawn from this is that the courts can endow with legal personality what they want to. In recognizing the property rights, but not the personal rights of the unborn child, we again encounter that consistency of law which seeks to protect the trust fund against dissipation. In short, property rights are recognized in both cases, in the case of the unborn child by ascribing personality as illustrated in the reference to *Thelluson* v. *Woodford*, and in the trust cases by refusing to recognize it. Also an unborn child may be the *cestui* of a constructive trust raised upon false representations made to the mother before such child was conceived. *Piper* v. *Haard*, 107 N.Y. 73, 13 N.E. 626 (1887).

[15] 4 DeG.F.&J. 259, 45 Eng. Repr. 1183 (1862).

right of exoneration. This, as well as reimbursement is allowed because of the nature of the duty of a trustee to his *cestui que trust*. This duty is one enforcible only in equity through a bill brought by the *cestui* for an accounting. Upon an accounting a trustee is obliged to turn over or show in his possession as the circumstances may indicate only the net proceeds of his administration over and above legitimate expenses and other authorized disbursements. The concepts through which this matter is handled do not come far from recognizing the trust as an entity with the trustee as an agent and the *cestui* as his principal. But of course this is in equity. All our learning tells us that as between *cestui* and trustee we are in the field of equity but that as to the rest of the world the trustee holds legal title to the trust *res* and hence is not an agent at all.

But even this is not all. If the trustee has a right of exoneration and neglects or refuses to use it or for some other reason the third party has been unable to get his claim satisfied, such party, after proper preliminaries may have the aid of the courts of equity to get his pay directly out of the trust *res*.[16] Thus the claimant is said to be "subrogated" to the trustee's right of indemnity or exoneration. In one of the leading English cases where a judgment at law was recovered against a trustee perosnally but remained unsatisfied the third party applied in

[16] "When the judgment operates only to bind the trustee personally, equity will protect the trust property from levy and execution and the creditor must, therefore, resort to equity in order to appropriate the trust property to his claim. There is not entire agreement as to whether he must first exhaust his legal remedies; but the considerations of practical convenience in the administration of the trust estate as well as the traditional policy of courts of equity of maintaining their jurisdiction as an extraordinary one to be resorted to only when the legal remedy is inadequate, would seem to favor the New York rule that the legal remedy against the trustee must be exhausted before coming into equity to reach equitable assets." Stone, 22 Col. L. Rev. 527, 530. The above argument would not seem to be applicable in those states in which law and equity have been most completely fused in one court and one single action in which all parties interested may be joined, all rights determined and both equitable and legal relief given as appropriate in the same decree.

chancery to have his claim satisfied directly out of the trust property. This was allowed.[17]

The last few paragraphs have undertaken the exposition of the following three points well established by authority:

1. A trustee who has paid a judgment for a "TRUST-TORT" is entitled to reimbursement.
2. A trustee against whom such a judgment has been given is entitled to exoneration from the trust assets.
3. A third party having such a judgment against a trustee may be subrogated to the trustee's right of indemnity.

It now becomes necessary to qualify these statements in accordance with what also seems to be the weight of authority.

The right of the trustee in equity to have the expense of satisfying such a judgment comes ultimately from the trust property, whether by reimbursement or exoneration, is dependent upon the state of his accounts as stated by Prof. Scott:[18] "If the trustee is in default to the estate, his claim to exoneration like his claim to reimbursement is reduced by the amount that he is indebted to the estate and the creditor's right against the estate is reduced accordingly; and if the amount of the trustee's indebtedness exceeds the amount of the creditor's claim, the creditor cannot hold the trust estate at all." This statement is of course equally applicable whether the creditor is a contract creditor or one who has a tort judgment.

Secondly: The right of a trustee to reimbursement or exoneration is said in many cases to be confined to cases where he is without personal fault. The meaning of expressions of this sort is clear enough in cases where the tort was committed by a servant whom it was proper for the trustee to employ and where proper care was used in selecting the employee. It is also clear enough when the tort was an intentional act of the trustee and resulted in no benefit to the trust estate. However there may

[17] *In re Raybould* (1900) 1 Ch. 199. For collections of cases on exoneration and reimbursement see footnotes in treatises and articles as cited notes 1, 2, and 3 *supra*. See also sec. 268 Restatement, Trusts.

[18] 28 Harv. L. Rev. 725, 22 Col. L. Rev. 527, 528 footnote 2.

be cases of fraud and deceit committed by a trustee actuated by over-zeal or a tough conscience in which instance the estate certainly should not be permitted to benefit by the act of him whom the writer again thinks of functionally as its agent. While this reasoning is not adopted there is authority for the result.[19]

Probably the majority of all the "TRUST-TORT" cases are those where injury to person or property has resulted from the trustee's failure to keep the property in repair. It has been chiefly in cases of this sort that the rule has been laid down that trustees must be sued in the personal and not in their representative capacity for "TRUST-TORTS." There are more of these cases in New York than in any other jurisdiction. The prevailing rule was early recognized and has been repeatedly followed there. It seems somewhat significant that so many of these New York cases have been those in which the tort claim arose out of defective conditions of premises, which must in the nature of things be a matter for which the trustee will ordinarily be personally responsible.[20] However, nothing seems to have been made of this circumstance in connection with the primary problem of the form in which suit must be brought. It has of course received attention in considering the right of the trustee to indemnity. Mr. Bogert suggests in this connection: "It is believed that equity should also allow the trustee reimbursement in the case of unintentional torts committed by the trustee, where there *is personal fault* on the part of the trustee, but the tort is a usual concomitant of the conduct of a business such as that which the trustee is carrying on for the trust."[21] It will be noted that in the above statement Mr. Bo-

[19] Footnotes, 3 Bogert, Trusts and Trustees, chap. 34, 44 A.L.R. 637.

[20] A few of these New York Cases are *Keating* v. *Stevenson*, 47 N.Y.S. 847, 21 App. Div. 604 (1897); *Moniot* v. *Jackson*, 81 N.Y.S. 688, 40 Misc. 197 (1903); *Norling* v. *Allee*, 13 N.Y.S. 791 (1891), and in other states, *Shepard* v. *Creamer*, 160 Mass. 496, 36 N.E. 475 (1894); *Baker* v. *Tibbetts*, 162 Mass. 468, 39 N.E. 350 (1895); *Everett* v. *Foley*, 132 Ill. App. 438 (1907).

[21] 3 Bogert, Trusts and Trustees, p. 2175.

gert is really talking about "the trust" as if it were an entity although he favors the orthodox rule which requires the tort claimant to sue the trustee in his individual capacity.[22]

The meaning of what seems to be the law in most jurisdictions for the tort claimant seems to be approximately as follows:

1. He may sue the trustee personally.
2. If he gets judgment, he may satisfy it out of the personal property of the trustee by ordinary legal process such as execution.
3. If judgment is not satisfied by the trustee, either with or without resort to execution, he may come into equity by means of a creditor's bill and seek to reach the trust *res*.
4. The right of the tort creditor to reach the trust *res* in equity is dependent upon a right in the trustee to be reimbursed or exonerated, which in turn is dependent upon two prerequisites: (a) That the trustee is not in arrears in his trust account: (b) That the tort was not a personal wrong of the trustee.
5. If the trustee is execution proof and without right to exoneration the tort claimant is without substantial remedy.

This seems particularly unfair to the claimant where the tort was committed by a servant and right to reach the trust *res* is denied because the trustee is in arrears. On the other hand it might seem unfair to some that the *cestui* should first have been robbed by his trustee and then have his property still further depleted to pay such a claim. Which point of view will appeal to the reader must of course depend on his fundamental value judgments. Which policy should prevail? Shall the law zealously guard trust property against encroachments or is it more important that injuries to third parties which arise out of the operation of trusts should be compensated? This suggests that it might be pertinent to consider the nature of the trust and of the property so held. Is it a trust to operate a business or to operate extensive rental property in which the trustee or his

[22] 3 Bogert, Trusts and Trustees, p. 2169.

agents retain control of the common parts of the premises, as in an office building or apartment house, or is it on the other hand merely a passive trust or an instance of leasing premises and collecting rents with the tenants in entire control?[23]

Representative Liability

There are a few cases, mostly recent, which allow a tort claimant to sue the trustee in his representative capacity and if judgment is rendered for him the claimant may satisfy it directly out of the trust *res*. There are so few of these cases that it is difficult to be certain just what is the scope of this right. Clearly it would be applicable where the tort was committed by an employee and did not involve any personal fault on the part of the trustee. In the case of *Ewing* v. *Foley*,[24] the Texas Supreme Court stated the question as follows: "Is the trust estate liable in damages for the negligence of the agent of the trustees? May the injured party proceed directly against the property of the trust estate in a suit against the trustees in their representative capacity?" After an extended discussion of the liability of trustees and of their right to indemnity in which the court dealt at some length with *Benett* v. *Wyndham* and *In re Raybould* it concluded: "The holding that a trustee in cases where he is not chargeable with personal fault or negligence, may legally be reimbursed out of the trust estate for such damages as may be recovered against him, is in effect a holding that *in such cases the trust estate is itself liable for such damages, and since the trust estate is so liable we think our practice allows it to be proceeded against in a suit brought directly against the trustee in his representative capacity.*"

[23] That the nature of these duties may be the basis for making an exception and that he may then be sued in his official capacity see infra. "It seems probable that the rule denying liability on the part of the estate for torts of executor, administrator, or trustee originated in cases of passive trusts where the only purpose of the executors etc., was in collecting and distributing the assets, and that the courts have not sufficiently considered the rule which should be applied when the business was being actively conducted for the estate." Annot. 44 A.L.R. 637, 639.

[24] 115 Tex. 222, 280 S.W. 499, 44 A.L.R. 627 (1926).

An even more recent case from Florida, *Smith* v. *Coleman*,[25] apparently allows direct action against the trust estate for a tort which may be said to involve a degree of personal fault on the part of the trustee in failing to see that the equipment on the trust premises was adequately safeguarded. The plaintiff in this case, a minor, was employed in a laundry which was being operated by a trustee with an active manager as the trustee's agent in charge. The plaintiff was injured by an unguarded machine of which the manager had failed to warn him. Action was brought against Smith as trustee. There was a verdict for the plaintiff and the judgment was against Smith *as trustee* and it was expressly provided in the judgment that it should be paid out of the assets of the trust estate. After a long discussion of points not pertinent to the present problem the court disposes of the trusts question in a few words: "This was correct, while the general rule is that the trust estate is not liable for the torts of the trustee, as the law will not allow the trust estate to be impaired by the negligence or improvidence of the trustee, this rule is subject to exceptions. Thus, where an active trust is created and the trustee is charged with the duty of carrying on a business, the trust estate may be liable for the negligence of the trustee or his employees, unless there be some limitation to the contrary imposed by statute or by the instrument creating the trust."

This case would seem to take a bolder stand than the few other allowing direct action against the estate in that the opinion makes no distinction as to whether the tort is committed by an employee or is the personal act or omission of the trustee himself. On the other hand it makes more of the point that this rule is to be confined to cases of an active trust to carry on a business.

Another case allowing recovery against the trustee in his representative capacity and directly out of the trust property is

[25] 100 Fla. 1707, 132 So. 198 (1931), noted 29 Mich. L. Rev. 1102.

Wright v. *Caney River Railway Co.*[26] In this case an employee was killed when a trestle gave way because the rain had washed away some of the earth supporting its foundation and this condition had been allowed by the trustee to remain unrepaired. This was a case of a trustee for creditors which brings it very close functionally at least if not formally to the cases which have arisen against railroad receivers and which have always been distinguished from the type of trust cases heretofore discussed in this paper.

There have of course been innumerable tort actions against receivers not only of railroads but of other businesses in which the receivers were sued in their official capacity and the judgments rendered against the property embarked in the business. The distinctions relied upon as between receiverships and private trusts is that a receiver is not the holder of legal title to the property but is an officer of the court and a representative of the debtor-owner who is still the holder of the legal title in his or its own capacity as a legal person. The answer to this reasoning then would seem to be that the action should be brought against the debtor.

In spite of the reason usually given for the distinction between trustees and receivers as to suing the trustee as an individual and the receiver as an officer, the trustee of a railroad operating the road for mortgage bondholders or other creditors will be held liable in his official capacity. This rule has been applied to various kinds of torts as may be noted from the cases cited in the sources referred to in the footnote.[27]

[26] 151 N.C. 529, 66 S.E. 588, 19 Ann. Cas. 384 (1909), also see *Miller* v. *Smythe*, 22 Ga. 154, 18 S.E. 46 (1893) and comment 3 Bogert, Trusts and Trustees, p. 2168.

[27] In the absence of personal negligence a receiver is not individually liable for the negligence of servants, but may be sued only in his official capacity, 43 Harv. L. Rev. 1122, 1124.

"The cases holding receivers liable in their official capacity for their torts and permitting collection from receivership funds is not at variance with the trust cases, because a receivership is in the ordinary sense distinguishable from a trust. It involves no 'Title' in the receiver . . . " 3 Bogert, Trusts and Trustees, p. 2164, footnote 37.

1 Clark on Receivers, p. 543; *Meara* v. *Holbrook*, 20 O.S. 137 (1870),

The difficulty in the way of treating a trust as an entity is, as indicated in the last previous paragraphs, not insuperable. In a receivership or a trust for the operation of a railroad, and in a few other cases, it is recognized that a tort judgment is an expense incident to the operation of the property. It is therefore prior to the claims of creditors whose claims antedated the receivership or trusteeship, and who, as creditors, are in effect the *cestuis que trust* in such a relationship.[28] Indeed, in the case of *Wright* v. *Caney River Railway Co.*[29] one of the points which was emphasized by the court as a reason for making the tort action a direct claim against the property was that the property was being operated for the creditors as beneficiaries. There seems no good reason why this reasoning is not just as appropos in considering other trusts where property is being operated by a trustee for the benefit of *cestuis que trust* as the reasoning employed in the cases following the majority view, which put all their emphasis on the state of the legal title shutting their eyes to the functions which are going on before them.

Numerous commentators have urged the practical value of this minority view, and Mr. Bogert in his treatise,[30] although

10 A.L.R. 1057 Annot.; *Blumenthal* v. *Brainerd*, 38 Vt. 402 (1866) (earliest American case). In England no separate action is allowed but the person injured files his claim in the receivership proceeding according to 1 Clark on Receivers, p. 518.

[28] *Brown* v. *Winterbottom*, 98 O.S. 127, 120 N.E. 292, 3 A.L.R. 1465 (1918) Annot. See also note 47 Harvard L. Rev. 359 on an Indiana case where tort claim which had not been reduced to judgment was permitted to be proved in the receivership and given priority over mortgage. This is an extension of the usual rule in this country which allows priority to expenses but does so class tort claims until they have been merged in judgment. *McCullough* v. *Union Traction Co.*, 206 Ind. 585, 186 N.E. 300 (1933).

[29] Note 26 *supra.*

[30] Section 270 Restatement, Trusts, "Persons to whom the trustee has incurred a liability in the administration of the trust can by a proceeding in equity reach trust property and apply it to the satisfaction of their claims, if by the terms of the trust the settlor manifested an intention to confer such a power upon them." It appears that the draftsman of the Restatement does not go as far as much of the case authority in this situation as to allowing a *representative suit.* This would substantially follow the suggestion of Mr. Justice Stone's article in such cases as this. It would serve to protect the claimant in case of an execution proof trustee. But logically of course, one

he adheres to the general theory that the right of the tort creditor must be a derivative thing and that actions should be against the trustee as a person, nevertheless recognized that there is a modern trend toward official liability.

Where the trust instrument provides that all obligations arising in the administration of the trust shall be paid from the trust assets, it is generally held that an action may be maintained against the trustee as such. It is not easy to see why, from a precedural standpoint, such a provision should make any difference. If a trust is not a matter of legal entity surely the settlor cannot make it one by a provision in his will or deed of trust. Of course such a provision should be effective to settle any doubt as to the right of the trustee to appropriate the trust assets for the purposes of discharging trust obligations. But this right, as we have seen, exists anyhow, except where the tort was the personal fault of the trustee, or he was in arrears in his accounts. Such a provision in the trust instrument was the basis of decision in a Missouri case.[31] This involved an injury to a carrier boy in the plant of the *Kansas City Star* which was being operated by the trustees under the will of its former owner, Wm. Rockhill Nelson, which provided that all liabilities incurred in the operation of the newspaper should be paid out of the estate. Action having been brought against the trustees, and one of them having died, it was contended that the action being personal abated. The lower court sustained the demurrer on this ground. This holding was reversed. This being a case where the harm arose out of the negligence of the trustees in not keeping the premises in proper repair the court relied for its result on the provision in the will. It should be noted in passing, however, that this was a trust to run a business and not merely to hold and lease out property and collect the rent.

cannot recognize the claimant's right to a representative suit even at the express authority of the settlor, without impliedly recognizing the entity of the trust. 3 Bogert, Trusts and Trustee, p. 2166, 44 A.L.R. 637, 678.

[31] *Birdsong* v. *Jones*, 222 Mo. App. 768, 8 S.W. (2d) 98 (1928).

There is also the case of *Prinz* v. *Lucas*[32] where we find a trust to continue a business and a provision in the deed of trust that there should be no personal responsibility in the trustees for negligence. The injury here was due to the negligence of a driver employed in the business of the trust. The trustees were sued in their official capacity and held liable as such.

Another situation, which has been made the basis of an exception to the rule of no liability upon trustees "Qua Trustee," is where the tort of the trustee has benefited the estate, but this is also treated in the *Restatement of Trusts*[33] on the same basis as the situation last discussed, *viz.*, as the basis of a right in equity in the claimant and then only when no satisfaction can be obtained from the trustee's individual property.

This general discussion of the tort liability of trust property for trusts suggests the question as to how such disbursements are to be allocated as between principal and income. This problem is the same when the money is finally taken out of the trust assets whether by trustee reimbursing himself, by an equitable execution under a creditors' bill or by allowing the representative suit and direct execution against the trust *res*.

It is of course well understood that the ordinary expenses of trust administration are chargeable to income.[34] Hence, the burden is felt most acutely by a life tenant as against a remainderman *cestui*. However, there are extraordinary expenses

[32] 210 Pa. 620, 60 Atl. 309 (1905).

[33] Sect. 269 Restatement, Trusts, "A person who has conferred a benefit on the trust estate and cannot obtain satisfaction out of the trustee's individual property can by a proceeding in equity reach trust property and apply it to the satisfaction of his claim to the extent to which the trust estate has been benefited, unless under the circumstances it would be inequitable to allow him such remedy." However there are not a few authorities allowing the trustee to be sued in his representative capacity and a direct resort to trust assets where the estate has been benefitted. 3 Bogert, Trusts and Trustees, p. 2169, 44 A.L.R. 637, 664.

[34] Again the reader is reminded that this paper does not aim at exhaustive citation of case authorities but for the most part merely refers to secondary sources wherein cases are collected. 4 Bogert, Trusts and Trustees, chap. 38, 40 Ohio Jur. 408, title "Trusts," by Prof. Vanneman: "It is a general rule that current expenses of an ordinary character must be paid out of the income."

which are sometimes apportioned or even charged entirely to the principal or *corpus* of the trust fund. There are many cases dealing with the allocation of attorneys' fees as expenses of trust when its validity has been under attack by disappointed relatives of the settlor. It has been quite generally held that such fees should be charged against the *corpus* of the trust.[35] This is consistent with the rule which charges the expense of permanent improvements upon the trust premises to principal as contrasted with ordinary repairs which are to be paid for out of income.[36]

It would seem reasonable to regard the cost of paying a tort claimant, who was injured by the negligence of a servant employed in the operation of the property as a current operating expense and hence chargeable to income. Where an injury is due to disrepair of the premises, if the payment is to come out of the trust fund, as we have seen some considerable authority allows, even where the condition is due to the personal fault or neglect of the trustee, it will ordinarily be in a sense because income was not used for making the repairs and so here too it

[35] "The regular annual or periodically recurring expenses arising in the administration of a productive trust are paid out of the income while extraordinary and unusual expenses are chargeable against the capital. The costs of litigation generally fall in the latter class." *Cogswell* v. *Weston*, 228 Mass. 219, 117 N.E. 37 (1917). This case held that legal expenses of investigating the trustees conduct and prosecution of an action on his bond were chargeable to principal rather than income. That such expenses should be apportioned, *In re Meyers Estate*, 161 N.Y.S. 1111 (1916); charged to principal, *In re Wentworth*, 116 Misc. 260, 190 N.Y.S. 364 (1921); *In re Petremonts Will*, 213 App. Div. 318, 210 N.Y.S. 379; aff. 241 N.Y. 586, 150 N.E. 566 (1925). Not to multiply cases it would seem to the writer that the later tendency is to charge to the *corpus* the cost of preserving the estate as such expense is incurred in connection with litigation.

[36] 40 Ohio Jur. 410: "An extraordinary expense, however, such as permanent repairs or building shall be apportioned between life tenant and remainderman." The case cited for this was, however, one involving the erection of a building on unproductive land. 4 Bogert, Trusts and Trustees, p. 2326. For distinction between repairs and improvements see p. 2328: "If such cost is placed upon the trust corpus there is at once an apportionment because of the reduction of the life *cestui's* future income. To take his present income also in part to meet the expenses of the improvement would put an undue burden upon the life *cestui*."

would hardly seem that, according to strict reasoning on the basis of source, this item also should be a charge upon income.

Where a trust constitutes a nuisance or trust property is so constructed as to cause harm to the person or property of another, it may well be that the *corpus* of the trust should bear the loss so caused to third parties.[37] Harm of this sort is not so much a result of operation as the ones previously mentioned.

In case the income account in a trust is not sufficient to meet a judgment, once the claimant has by whatever theory and process established his right to reach the trust propery, he is of course not obliged to confine himself to income or to choose between the various assets except insofar as he is limited by statutes.

If the *corpus* of a trust fund has been employed to satisfy a tort claim which should be considered as an operational incident, it should be proper to accumulate income from the trust capital remaining thereafter until the *corpus* is made whole again.

In any case where a large sum is chargeable against a trust fund for such purpose as the satisfaction of a tort claim, and where such claim will leave the life tenant in a position of hardship, or indeed in any such case, the courts should stand ready as between trustee, life beneficiary, and remainderman, to see that a fair and equitable scheme of allocation is adopted in view of the probable dominant purpose of the settlor. This purpose

[37] *Ireland* v. *Bowman*, 130 Ky. 153, 113 S.W. 56 (1908) where trustees were directed by will to maintain a dam, it was held that the third person damaged thereby could maintain an action against the trustees in their representative capacity and the judgment should be payable out of the trust property. Nothing was said as to allocation of this expense as between income and principal. In sec. 12, Uniform Principal and Income Law are a set of rules conforming to general current practice but nothing therein expressly refers to judgments in tort actions.

Mr. Bogert makes this statement: "The costs of litigation incurred by the trustee in seeking to enforce the trust or in defending it are generally placed upon the capital of the trust fund. Such items include attorney's fee, court costs and disbursements." 4 Bogert, Trusts and Trustees, p. 2335. By the word "disbursements" Mr. Bogert may mean the payment of judgments; however none of the main cases which he cites in his footnote have to do with this particular type of obligation.

may well be that the present life beneficiary's income be maintained rather than the *corpus* be preserved for a remainderman who is to take in the remote future. The disposition of courts to do things like this is more marked in some recent cases than a strict reading of ancient precedents would indicate.

Notwithstanding the frequent statements that courts regard it as the normal intent of those who create trusts, that the life tenants shall have deducted from the income whatever is necessary to preserve the capital intact, a realistic interpretation of modern trusts with a genuine interest to learn the real intent of the settlor will probably indicate that the average man who "trustees" his family is chiefly interested that his widow and children shall be comfortably supported and only secondarily that his more remote descendants shall come into his fortune. The orthodox presumption is a direct consequence of thinking the thoughts of the feudal lawyers who worked out the basic rules of the law of trusts and future interests.